UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

IMAGEFIRST UNIFORM RENTAL SERVICE, INC.	:		
Respondent,	:		
and	:	**Case Nos.**	**22-CA-161563**
	:		**22-CA-181197**
LAUNDRY DISTRIBUTION AND FOOD SERVICE JOINT BOARD, WORKERS UNITED, A/W SERVICE EMPLOYEES INTERNATIONAL UNION	:		
Charging Party.	:		

RESPONDENT IMAGE FIRST UNIFORM RENTAL SERVICE, INC.'S ANSWERING BRIEF TO COUNSEL FOR THE GENERAL COUNSEL'S EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE

Submitted by:

Christopher J. Murphy
1701 Market Street
Philadelphia, PA 19103
(215) 963-5601
christopher.murphy@morganlewis.com

Michael K. Taylor
1701 Market Street
Philadelphia, PA 19103
(215) 963-4740
michael.taylor@morganlewis.com

Attorneys for Respondent
ImageFIRST Uniform Rental Service, Inc.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

I. INTRODUCTION

Respondent ImageFIRST Uniform Rental Service, Inc., through its undersigned counsel, hereby submits this Answering Brief to Counsel for the General Counsel's ("CGC") Exceptions to the Decision of the Administrative Law Judge ("ALJ").

The Counsel for the General Counsel ("CGC") filed three exceptions to the ALJ's April 18, 2017 Decision ("ALJD") in this case:

- Whether the ALJ erred by failing to conclude that Respondent's General Manager/Vice-President James Kennedy ("Kennedy") instructed lead employee Miriam Farez ("Farez") to engage in surveillance of Respondent's employees' activities on behalf of the Union and report her findings back to him.

- Whether the ALJ erred by failing to find that Respondent, through Kennedy, informed employees that it would be futile for them to select the Union as their collective-bargaining representative.

- Whether the ALJ erred by failing to order Respondent to rescind its unlawful handbook rule at all of its California, Florida, Georgia, Illinois, New Jersey, New York, North Carolina and Pennsylvania locations.

(CGC's Brief in Support of Exceptions to the Decision of the Administrative Law Judge ("CGC Brief in Support") at 2-3). For the reasons set forth below, each of these exceptions should be overruled.

II. ARGUMENT

A. The Counsel for the General Counsel's Exceptions to the Administrative Law Judge's Decision Should Be Overruled.

1. Contrary to the CGC's Contention, the ALJ Properly Concluded that Kennedy Did Not Instruct Farez to Engage in Surveillance of Respondent's Employees' Activities on Behalf of the Union and Report Her Findings Back to Him. (Exception No. 1).

The ALJ dismissed the allegation contained in Paragraph 16 of First Amended Consolidated Complaint ("Complaint") that "[a]bout July 13, 2015, Respondent, by James Kennedy, in his office located at Respondent's Clifton, New Jersey facility, asked its employees

to ascertain and disclose to Respondent the union membership, activities, and sympathies of other employees." As litigated at the hearing, this allegation related to a claim by the CGC that Kennedy instructed Farez to surveil the union activities of other employees and to report her finding to him.

The CGC's only evidence in support of this allegation was the testimony of Farez. (ALJD at 3:26-29, Tr. [cite to Farez testimony]). Respondent's only witness on this issue, Kennedy, denied that he had given Farez any such instruction. (ALJD at 3:29-30).

In dismissing this allegation, the ALJ wrote:

> Former lead person Miriam Farez testified that General Manager/VP James Kennedy called her into his office of July 13 and told her she was his eyes and ears at the plant. She testified that Kennedy asked her to report back to her which employees were in favor and which were opposed to the Union. Kennedy denies that any such meeting or conversation took place. Given the fact there are no witnesses to this alleged conversation and that Respondent fired Farez 2 days later, I find no reason to credit Farez over Kennedy. This citation allegation is dismissed.

(ALJD at 3:26-32).

The CGC argues that because the ALJ did not credit Kennedy's testimony in all respects, he somehow erred by failing to credit Farez over Kennedy on this point. At bottom, the CGC challenges the ALJ's "giving credence instead to Kennedy's contrary testimony." (CGC Brief in Support at 3). The CGC acknowledges that under *Standard Dry Wall Products*, 91 NLRB 544 (1950), he faces a heavy burden to overturn the ALJ's credibility determinations. (*Id*. at 3-4). He nevertheless invites the Board to "independently evaluate Miriam Farez's credibility and credit her testimony over the unreliable testimony of Manager James Kennedy." (*Id*. at 4). For the following reasons, the Board should decline this invitation to engage in *de novo* fact-finding and overrule this Exception.

Initially, the CGC completely misses the import of the ALJ's comment regarding Farez's discharge just two days after Kennedy allegedly directed her to spy on his behalf. The ALJ's clear point was that if Kennedy had had a private meeting with Farez to set her up as his "eyes and ears" in the plant, Respondent would not have terminated her just two later and deprived itself of a valuable asset. Here, the ALJ weighed the inherent probability of the testimony and concluded that Respondent would not have peremptorily terminated Farez if Kennedy, in fact, had directed her to be his spy. Standing alone, this is enough to overrule the CGC's exception.

Second, the CGC points to four occasions in which he claims the ALJ discredited Kennedy. (CGC Brief in Support at 3 (referencing ALJD at 4:5; 5:26-29; 10:15-16 and n.7)). From there, the CGC asserts that because the ALJ discredited Kennedy on a few occasions, the ALJ should discredit him in this particular instance. This argument ignores the numerous occasions in which the ALJ credited Kennedy's testimony. Specifically, the Complaint alleged that Kennedy, directly or indirectly, committed nine separate violations of the Act. (Complaint at ¶¶ 16, 18(a)-(c), 20-23, 25). The ALJ found merit in just four of those allegations. (ALJD at 11:15-22). In dismissing the other allegations, the ALJ necessarily credited Kennedy. (*See e.g.*, ALJD at 3:36-4:34; 6:42-48 (discussing reasons to dismiss paragraph 18 of the Complaint)). In addition, it is routine for a factfinder to credit some, but not all, of a witness' testimony. *Daikichi Sushi*, 335 NLRB 622 (2001) ("However, ['']nothing is more common in all kinds of judicial decisions than to believe some and not all['] of a witness' testimony.") (citations omitted).

Third, the cases on which the CGC relies, *Stevens Creek Chrysler Jeep Dodge, Inc.*, 357 NLRB 633, 635 (2011) ("*Stevens Creek II*") and *Connecticut Health Care Partners*, 325 NLRB

351 (1998)[1], are inapposite. The *Stevens Creek II* case was preceded by any earlier Board decision, *Stevens Creek Chrysler Jeep Dodge, Inc.*, 353 NLRB 1294 (2009) ("*Stevens Creek I*"), remanding certain fact issues to the ALJ for further consideration. 353 NLRB at 1297-98. In *Stevens II*, the Board concluded that the ALJ "fail[ed] to respond to the detailed instructions" on remand. 357 NLRB at 635. In reversing the ALJ's credibility determination at issue, the Board relied on the fact the ALJ had not appropriately considered or evaluated evidence that "explicitly contradict[ed]" that credibility determination. *Id.* at 636. In this case, the ALJ evaluated all the relevant evidence – the testimony of Farez and Kennedy and Farez's termination – and credited Kennedy.

The Farez/Kennedy interaction was a classic "he said, she said" situation. The ALJ believed Kennedy. There is no basis in this record to second guess that determination. For all these reasons, the Board should overrule this Exception.

2. Contrary to the CGC's Contention, the ALJ Properly Concluded that Kennedy Did Not Inform Employees that it would be Futile for Them to Select the Union as Their Collective Bargaining Representative. (Exception No. 2).

The CGC claims in his second exception that the ALJ did not address the allegation in paragraph 18(c) of the Complaint that Kennedy told the facilities employees that it would be futile for them to choose the Union as their bargaining representative.

In fact, the ALJ twice addressed in detail the allegations of paragraph 18 of the Complaint. (ALJD at 3:34-4:34; 6:40-48). Therein, the ALJ considered and rejected all the allegations of that paragraph, including the futility allegation, stating: "I decline to credit the

[1] The GCG's reliance on *Connecticut Health Care Partners* is mistaken. The CGC's parenthetical quotation simply states that an employee's termination by an employer, standing alone, is not a basis to discredit the employee's testimony. Here, the ALJ did not indicate that he relied on Farez's termination as a basis for discrediting her. Rather, as stated above, the import of Farez's termination was that it was inherently improbable for Respondent to recruit her as a spy and then abruptly terminate her.

employee witnesses' testimony on this point and others regarding the meetings conducted by Kennedy and Owner Berstein—unless otherwise specifically credited." (*Id*. at 3:9-11). While the ALJ was specifically addressing the creation of impression of surveillance privilege allegation, his conclusion (based on the incredibility of the employee witnesses) was much broader – he declined to credit those witnesses' testimony on other allegations of paragraph 18. (*Id*.) The ALJ reiterated this conclusion more forcefully when discussing paragraph 18 on page 6 of his Decision: "The General Counsel's testimony is too unreliable to support a finding that Respondent, by Kennedy, violated the Act ***in any respect*** at this meeting." (*Id*. at 6:43-45 (emphasis added)). The ALJ's conclusion that Kennedy did not violate "the Act in any respect" clearly covers the discrete allegation of paragraph 18(c) of the Complaint.

To avoid the ALJ clear credibility determinations, CGC invites the Board to rely on a single sentence in a single document, G.C. exh. 13(a), to make the massive inference that Kennedy told employees that it would futile for them to select the Union as their bargaining representative. (CGC Brief in Support at 7). Simply, the Board cannot make such an inference based on double hearsay, especially since the ALJ categorically rejected the testimony of the employee witnesses on this point.

3. Contrary to the CGC's Contention, the ALJ Did Not Err by Failing to Order Respondent to Broadly Rescind its Disputed Handbook Rule. (Exception No. 3).

In his Decision, the ALJ concluded that a provision in Respondent's handbook purportedly subjected employees to discipline for discussing payroll information in violation of the Act. (ALJD at 3:16-23).[2] Assuming that it overrules Respondent's exception on this point

[2] Respondent has taken exception to the ALJ's conclusion on this point for the reasons stated in its Brief in Support of Exceptions at 9-11, which is incorporated herein by reference.

and finds a violation of the Act, the Board should nevertheless overrule the CGC's exception here.

In his Decision, the ALJ did not find, explicitly or implicitly, that the allegedly offending provision of Respondent's handbook applied anywhere other than at the Clifton, New Jersey facility that was the locus of this dispute. And, the CGC did not take exception to the ALJ's failure to make a finding on this point. In the absence of an underlying factual finding on broad application or a related exception on this point, the scope of the ALJ's recommended order is appropriate and should be adopted by the Board. *See Guardsmark, LLC*, 344 NLRB 809, 812 (2005) ("Concerning the scope of notice posting, we have consistently held that, where an employer's overbroad rule is maintained as a companywide policy, we will generally order the employer to post an appropriate notice at all of its facilities where the unlawful policy has been or is in effect."); *Raley's, Inc.*, 311 NLRB 1244, n.2 (1993) (enforcing broad order where "the Respondent did not except to the judge's finding that its dress code rule applied to its employees at all of its stores."); *Fresh & Easy Neighborhood Market*, 356 NLRB 546, n.1 (2011) (Broad order appropriate based on "the judge's finding that the Respondent maintained an unlawful no-distribution rule in its employee handbook and on its companywide intranet site before September 2009.") Based on the ALJ's findings and conclusions on this issue, the scope of his recommended order is appropriate and should be adopted by the Board, if it finds a violation of the Act.

III. CONCLUSION

For the foregoing reasons, Respondent ImageFIRST Uniform Rental Services, Inc. respectfully urges the Board to overrule the three exceptions urged by the counsel for the General Counsel.

Dated: September 18, 2017

Respectfully submitted,

/s/ Christopher J. Murphy
Christopher J. Murphy
1701 Market Street
Philadelphia, PA 19103
(215) 963-5601
christopher.murphy@morganlewis.com

Michael K. Taylor
1701 Market Street
Philadelphia, PA 19103
(215) 963-4740
michael.taylor@morganlewis.com

Attorneys for Respondent
ImageFIRST Uniform Rental Services, Inc.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on September 18, 2017, a copy of Respondent's Answering Brief to General Counsel's Exceptions to the Decision of the Administrative Law Judge, were served, via email, upon the following:

Cristina E. Gallo, Esq.
Kennedy, Jennik & Murray, P.C.
113 University Place, 7th floor
New York, NY 10003
cgallo@kjmlabor.com

Eric B. Sposito
National Labor Relations Board, Region 22
20 Washington Place, 5th Fl
Newark, NJ 07102-3129
Eric.Sposito@nlrb.gov

Ira Jay Katz, Esq.
Associate General Counsel
Workers United, a/w SEIU
12 West 31st Street
12th Floor
New York, NY 10001
ira.katz@workersunitedunion.org

/s/ Christopher J. Murphy
Christopher J. Murphy